

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

JIMMY HEARD,)	
)	
Petitioner,)	
)	
v.)	No. 3:09-1144
)	JUDGE HAYNES
)	
JAMES FORTNER, WARDEN)	
)	
Respondent.)	

ORDER

Before the Court is the Petitioner's motion for relief pending appeal (Docket Entry No. 62) under Fed. R. Civ. P. 62.1. On January 25, 2011, the Court adopted the Magistrate Judge's Report and Recommendation (Docket Entry No. 39), denying Petitioner's petition for writ of habeas corpus as untimely as well as barred by the procedural default doctrine, but also denied without prejudice Petitioner's unexhausted claim on the attempted murder count. See Order (Docket Entry No. 44). On February 11, 2011, Petitioner filed a notice of appeal (Docket Entry No. 50) and a motion for certificate of appealability (Docket Entry No. 48). On March 2, 2011, Petitioner filed an application to appeal *in forma pauperis* (Docket Entry No. 55). On March 18, 2011, the Court denied Petitioner's motion for certificate of appealability and an application to appeal *in forma pauperis*. See Order (Docket Entry No. 59).

Rule 62.1(a) provides that:

If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may:

- (1) defer considering the motion;
- (2) deny the motion; or
- (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.


Id.

Petitioner argues that in deciding his motion for new trial the state trial court violated Tenn. R. Crim. P. 32(e) by reserving its final ruling as to issues of sentencing. Yet, as previously stated, Petitioner did not seek any type of state review for his claims beyond his motion for new trial, and his claims are procedurally defaulted. Further, the Court dismissed without prejudice Petitioner's unexhausted claim on the attempted murder count. Any claims arising out of the attempted murder count must first be presented to the state courts.

Accordingly, Petitioner's motion for relief pending appeal (Docket Entry No. 62) is **DENIED**.

It is so **ORDERED**.

ENTERED this the 13th day of July, 2011.


WILLIAM J. HAYNES, JR.
United States District Judge